No. 33248-5-II

☐ SUPREME COURT

☒ COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

James M. and Shannon Young, *Petitioner*
v.
Judith Young, *Respondent.*

☐ Petition for Review
☐ Appellant's Opening Brief
☐ Respondent's Brief
☒ Reply Brief of Appellant
☐ Other:_____
_____

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PM Feb 6, 06

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I. INTRODUCTION

Jim and Shannon Young, petitioners herein, submit this reply brief.

The trial court should have awarded Jim and Shannon Young **the greater of** (1) what it would have cost respondent to obtain the same work that Jim and Shannon Young performed to improve her property on the market; and (2) the increase in the value of the property caused by Jim and Shannon Young's work. The trial court explicitly acknowledged that this was the"applicable" measure of recovery.

The trial court did not apply this measure of recovery. The trial court instead limited Jim and Shannon Young's recovery to its approximation of the "costs" Jim and Shannon Young had actually incurred performing the work. The trial court thereby conferred on Judith Young a windfall in excess of $250,000.

The trial court's decision to employ an incorrect measure of recovery should be reversed. The Court should remand this case with instructions that the trial court enter a new judgment based upon the correct measure of recovery.

II. STANDARD OF REVIEW

The trial court did not employ what the trial court found was the "generally" applicable measure of recovery. The trial court's selection of an incorrect measure of recovery presents a legal issue which the Court of Appeals reviews *de novo*. *Robel v. Roundup Corp.*, 148 Wn. 2d 35, 43, 59 P.3d 611 (2002). See also *Kobza v. Tripp,* 105 Wn. App. 90, 94-95, 18 P.3d 621 (2001).

The respondent does not respond to this analysis. Instead, although the undisputed expert testimony accepted as credible by the trial court established that it would have cost the respondent $760,382.00 (in year 2000 dollars) to hire a contractor to perform the work that Jim and Shannon Young performed, the respondent asserts that the trial court had "discretion" to award a lesser amount. Respondent's Brief, pp. 2, 17-19. This Court should reject this analysis.

First, the respondent in effect is arguing that this Court cannot review a judgment for inadequacy:

> The difficulty with that argument is that, carried to its logical conclusion, there could never be an inadequate verdict because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to the damages, even though there was no contradiction or dispute.

Palmer v. Jensen, 132 Wn. 2d 193, 200, 937 P.2d 597 (1997), quoting *Ide v. Stoltenow,* 47 Wn. 2d 847, 851, 289 P.2d 1007 (1955).

Second, the trial court was not entitled to disregard the undisputed testimony of the expert witnesses, at least without articulating good legal reasons for doing so. *Bernsen v. Big Bend Electric Co-op, Inc.,* 68 Wn. App. 427, 432, 842 P.2d 1047 (1993); *Meeker v. Howard,* 7 Wn. App. 169, 171, 499 P.2d 53, review denied 81 Wn. 2d 1003 (1972); *Cochran v. Cochran,* 2 Wn. App. 514, 517-18, 468 P.2d 729 (1970). And here, the trial court did not do so. The trial court specifically found the testimony of Jim and Shannon Young's expert witnesses to be credible. FoF 157, 163. Indeed, it incorporated their cost estimator's report into its Findings of Fact. FoF 77.

This is not a case where the trial court applied the correct measure of recovery to disputed facts. In this case, the facts were either not disputed, or the trial court specifically resolved disputes in favor of Jim and Shannon Young. And, the trial court was aware of the correct measure of recovery. (CoL 5). It simply declined to apply it. CoL 6-7. The trial court's decision to employ an incorrect measure of recovery is subject to *de novo* review by this Court.

III. JIM AND SHANNON YOUNG PRESERVED THEIR CLAIM AS TO THE MEASURE OF RECOVERY FOR REVIEW

Jim and Shannon Young preserved their claim as to the measure of recovery for review. It is the respondent who is now making arguments addressed to this issue that she never made to the trial court.

In order to raise an issue on appeal, a party must have first brought that issue to the attention of the trial court and obtained a decision from the trial court. RP 2.5(a); *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P.2d 351 (1983). A party who raises an issue before the trial court enters judgment has no obligation to make a post-judgment motion in order to preserve that claim for review. *Id.* ("Failure to make a [post-judgment] motion when it would enable the trial court to correct its error precludes raising the issue on appeal, **unless the error was pointed out at some other point in the proceedings**") (emphasis added).

Here, Jim and Shannon Young fully complied with this rule. Jim and Shannon Young squarely advised the trial court that the correct measure of recovery was **the greater of**: (1) the cost Judith Young would have incurred to have hired a contractor to perform the work that Jim and Shannon Young had performed; or (2) the amount by which their work had increased the

value of her property, whichever was greater. (CP 601) (Trial Brief). Jim and Shannon Young not only articulated the correct measure of recovery, but explicitly advised the Court that it would be improper, under the law, to limit recovery only to the costs that Jim and Shannon Young themselves incurred:

> [T]he law on this, Your Honor, I submit, is crystal clear. That you award the cost to obtain similar services on the market, or the increase in value in the property resulting from the work, whichever is greater. We cited several cases that say that, and opposing parties have not given you any law to the contrary.
>
> And again, **under that standard the Court doesn't look to what it cost the claimant to provide the services because in large part what we're asking for is compensation for labor for which there is no record or any way to itemize cost other than to look at what it would have cost on the market.**

RP 42-43 (emphasis added). Jim and Shannon Young made this same point in their closing statement:

> Now, the second issue, Your Honor, is how much. Again, we have provided Your Honor with law on what the measure of damages is in an unjust enrichment action. And the opposing counsel has not disputed that law at all, hasn't given you a single case, and as we've set forth in the trial brief, the modern rule is that the claimant is entitled to recover the greater of what it would cost to obtain the same work and services on the market; **in other words, an objective measure, the market cost, rather than a subjective measure, the cost the claimant actually incurred.** Or, in the alternative to that, they can have, if it's larger, the increase in value to the property.

RP 788-89 (emphasis added).

To the contrary, it is the respondent who now makes arguments addressed to this issue that she never made to the trial court. The respondent **never** provided the trial court with briefing that addressed the issue of measure of recovery. See CP 513-515 (Response to summary judgment); CP 589-90 (Respondent's Trial Brief). The respondent **never** claimed that the trial court should limit Jim and Shannon Young's recovery to the costs that they had actually incurred. *Id.* Respondent did not raise these issues because, as respondent's counsel stated in his opening argument:

> In terms of damages, Mr. Edwards has repeatedly made the point already that we have not responded to their legal argument, we have not responded to Mr. Summers' estimates. We have not responded because **that is not the turf upon which this case will be fought.**

RP 59 (emphasis added).

In sum, Jim and Shannon Young squarely raised this issue before the trial court. The record shows that the trial court fully understood the correct measure of recovery. See CoL 5. It just chose to ignore that measure and to limit Jim and Shannon Young's recovery to its approximation of the costs Jim and Shannon Young had themselves incurred. CoL 6-7; (CP 658-59

(Transcript of Trial Court's May 30, 2005 decision at 9-10). Jim and Shannon Young preserved their claim of error for review.

IV. ANALYSIS

A. The proper measure of recovery in an unjust enrichment case is **the greater of**: (1) the cost the property owner would incur to obtain the same services on the market; and (2) the amount by which the work has increased the value of the property.

On the merits, the Court should hold that the proper measure of damages in an unjust enrichment case is the greater of: (1) the cost the property owner would incur to obtain the same services on the market; and (2) the amount by which the services provided have increased the value of the property. *Realmark Developments, Inc. v. Ranson*, 214 W. Va. 161, 166, 588 S.E.2d 150, 155 (2003); *Robertus v. Candee*, 205 Mont. 403, 408-09, 670 P.2d 540, 543 (1983). See also Restatement (Second) of Contracts § 371 Comment b (1981) (noting that the claimant "is commonly allowed the more generous measure of reasonable value" except when the claimant is in breach).

Respondent offers no substantive argument in opposition to the "greater than" rule. Instead, respondent merely notes that no Washington

Court has yet squarely adopted it. Respondent's Brief, p. 5.[1] If no Washington court has squarely adopted this rule, it is only because no Washington court has squarely been presented with proof of the amount to

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[1] At one point in her brief, the respondent asserts that Jim and Shannon Young are not entitled to recover under the theory of unjust enrichment at all, on the basis that recovery should be limited to the situation in which a contract is unenforceable on account of the statute of frauds. See Respondent's Brief, pp. 13-14. The Court should reject this contention.

First, the respondent has not cross-appealed. She also has not challenged the trial court's findings of fact establishing that Jim and Shannon Young were entitled to recover in unjust enrichment. Therefore, the respondent is precluded from even raising this claim.

Second, as respondent herself points out (Respondent's Brief, pp. 6-8), unjust enrichment is a broad theory which permits recovery whenever one person receives a benefit that in equity in good conscience he or she should not retain. *Bailie Communications v. Trend Bus. Syst.,* 61 Wn. App. 151, 159, 810 P.2d 12, review denied 117 Wn. 2d 1029 (1991); *Chemical Bank v. Washington Public Power Supply System,* 102 Wn. 2d 874, 904, 691 P.2d 524 (1984), cert. denied 471 U.S. 1065, 1075 (1985).

Washington Courts have repeatedly held that a request that someone perform work, followed by the performance of that work, gives rise to an obligation to pay for that work. See, e.g., *Kilthau v. Covelli,* 17 Wn. App. 460, 462, 563 P.2d 1305, review denied 89 Wn. 2d 1010 (1977). See also Restatement of (First) Restitution, § 53(1)(b) (1957) (claimant who performs services in exchange for agreement to convey land, where land is not sufficiently described to permit specific performance, is entitled to recover for the services performed on theory of unjust enrichment). Here, that is exactly what occurred. FoF 44-45 (Respondent asked Jim and Shannon Young to do the work necessary to fix up the property in anticipation of Judith Young's move), FoF 52-53 (respondent led Jim Young to believe she would pay him for work by buying him a property nearby).

Washington Courts have also held that recovery in unjust enrichment is appropriate for work performed in the mutually mistaken belief that there is a contract. *Draper Machine Works, Inc. v. Department of Natural Resources,* 117 Wn. 2d 306, 320, 815 P.2d 770 (1991), citing *Chemical Bank,* 102 Wn. 2d 904-5, 910. Again, that occurred here. FoF 112 (by June 2001, both parties had in good faith formed belief that they had reached an agreement to develop property as a cattle ranch); FoF 114 (parties in fact had not actually reached agreement); FoF 116-119 (both parties acted in reliance on supposed agreement).

which a claimant would be entitled under both potential measures of recovery.

However, the Washington Supreme Court has articulated and applied each of these measures of recovery. See *Noel v. Cole,* 98 Wn. 2d 375, 383, 655 P.2d 245 (1982) (where property owner asked claimant to perform work to improve property, claimant entitled to recover cost to defendant to obtain same services on the market); *Hardgrove v. Bowman,* 10 Wn. 2d 136, 137-38, 116 P.2d 336 (1941); *Smith v. Favilla,* 23 Wn. App. 59, 62-63, 593 P.2d 564, review denied 92 Wn. 2d 1022 (1979) (claimant improving real property entitled to recover increase in the fair market value of the property). These cases clearly suggest that the Washington Supreme Court, if squarely presented with the issue, would adopt the"greater than" rule of recovery.

Moreover, this rule makes perfect sense. It awards a claimant who performs work efficiently the value associated with that efficient performance. It also ensures that the defendant, who in equity and good conscience is entitled to retain no benefit from the claimant's work, to disgorge the full value of that work, so as not to reap a windfall.

The Court should hold that the applicable measure of damages is **the greater of:** (1) the cost the property owner would have incurred to obtain the

same services from some other person; and (2) the amount by which the services have increased the value of the property.

B. It would have cost the respondent at least $760,382 to hire another contractor to perform the work that Jim and Shannon Young performed.

In *Noel v. Cole,* 98 Wn. 2d 375, 383, 655 P.2d 245 (1982), the Washington Supreme Court squarely held that where a claimant, without fault, provides services that improves the property of another, the claimant is entitled to recover:

> the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position. Restatement (Second) of Contracts § 371, Comment b (1981); 12 S. Williston, Contracts § 1485 (3d ed. 1970).

This language is taken directly from the Restatement. The Restatement, in turn, makes it clear that the cost referred to is the objective cost–i.e., what it would have cost the defendant to obtain the same services on the market. See Restatement (Second) of Contracts, § 371, Comment a (1981) (rule provides for recovery based on market price).

Respondent argues that in adopting this measure of recovery, the Washington Supreme Court in *Noel* intended to limit the claimant's recovery to the cost which the claimant him or herself actually incurred in performing

the work rather than what it would have cost the respondent to go out and hire the same work "on the market." Respondent's Brief, p. 11-12. The Court should reject this contention.

The Supreme Court in *Noel* explicitly held that the unjust enrichment claimant is entitled to recover what it would cost **the defendant to obtain** the benefit, not what it cost **the claimant to provide** the benefit. 98 Wn. 2d at 383. The Supreme Court in *Noel* held that only an at-fault claimant should be limited to recovery only of the actual costs they incurred. *Id.,* fn. 6, citing *Edwards v. City of Renton,* 67 Wn. 2d 598, 607, 409 P.2d 153 (1965).

The Supreme Court noted that the plaintiff's actual cost is "some evidence of value." *Id.* at 383. Market rates typically provide for reimbursement of not only cost, but also a reasonable profit. Therefore, where there is no direct evidence of the fair market value of the services that have been rendered, the Washington Supreme Court has held that a person who, without fault, has rendered construction services is entitled to recover the cost incurred in rendering them, plus a reasonable profit. *Heaton v. Imus,* 93 Wn. 2d 249, 254, 608 P.2d 631 (1980).

Respondent cites *State v. A.N.W. Seed Corp.,* 116 Wn. 2d 39, 802 P.2d 1353 (1991) for the proposition that "reasonable value" means "actual

value received by the defendant." Respondent's Brief, p. 12-13. In *A.N.W. Seed,* a plaintiff executed on a judgment by arranging for a sheriff's sale of the defendant's property. 116 Wn. 2d at 42. After the judgment was reversed, the defendant sought restitution pursuant to RAP 12.8. *Id.* The issue presented was whether, under RAP 12.8, the defendant could recover the fair market value of the property, or just the amount for which the property had sold at the sheriff's sale. *Id.* at 43-44.

The Court noted that if it allowed the defendant to recover the market value of the property sold at the sheriff's sale, this would as a practical matter preclude creditors from acting to collect on appealed but unsuperceded judgments. 116 Wn. 2d at 47-48. The Court further noted that the defendant could have, but had not, acted to supercede the judgment, and thereby prevent the sale. *Id.* at 48. In order to promote the important public policy in favor of the collectibility of judgments, and because the defendant had not superceded the judgment, the Court held that the debtor's recovery was limited to reimbursement of the proceeds that the creditor actually received at the Sheriff's sale. *Id.* at 47.

A.N.W. Seed has no application here. *A.N.W. Seed* involved a demand for restitution pursuant to RAP 12.8, not recovery under for services

requested under a theory of unjust enrichment. In *A.N.W. Seed,* the judgment debtor was at fault; it had the right to supercede the judgment, but failed to do so. Here, in contrast, Jim and Shannon Young were not at fault but at all times acted in good faith. FoF 112-13, 116-19. And in *A.N.W. Seed*, there were sound policy reasons to limit the recovery to the proceeds actually received, rather than the market value of the property. Here, in contrast, the policy underlying unjust enrichment requires that the respondent disgorge the full value of the services that she requested Jim and Shannon Young to perform, and which have substantially increased the value of her property.

Noel applies to these facts. *A.N.W. Seed* does not. Following *Noel*, the trial court should have awarded Jim and Shannon Young the amount it would have cost the respondent to hire a contractor to perform the work that Jim and Shannon Young performed.

Moreover, Jim and Shannon Young provided the trial court with direct evidence showing what it would have cost the respondent to hire another contractor to perform the work that they performed. Michael Summers, a professional cost engineer, testified, without contradiction, that it would have cost respondent $760,382.00 to hire a contractor to perform the work that Jim and Shannon Young performed:

The methodology is quite similar for any cost estimate. Basically you determine what the scope of work is, the extent of the work, determine the site characteristics because each site is unique, then you set about determining the quantities and materials that have to be either purchased or removed or relocated in the course of the building. After you determine those quantities, which are really the basis for the estimate, the base line of the estimate, then you start determining the unit prices or labor factors or equipment factors that are necessary to put dollars to the scope of work, and that really leads you to the bottom line of the direct construction cost.

After you get a total of those, then you have to determine what is required in the way of general supervision, temporary facilities, tools and equipment in order to construct the project. At that point you determine an appropriate overhead and profit for the contractor doing work as well as the cost of bonds, insurance, business taxes and state sales tax.

Q. And were you asked to do that in this case, provide a cost estimate?

A. What I was asked to do was, after walking through the site and through the house with Jim Young, I set about to determine the quantities of materials as I described earlier in order to determine what it would have cost to have performed the work to get the ranch up and running if it were performed by a general contractor.

RP 386-87 (Testimony of Michael Summers).

Q. Now, in this case the bottom line is what?

A. The bottom line is the probable cost to have had this work done by a general contractor to get this ranch from its deteriorated, neglected condition described to me at the beginning of their ownership of the site and get it up and running for the ranch that I saw in January of last year.

Q. Alright. And your total estimate for that is?

A. $760,382.00.

RP 418 (Testimony of Michael Summers).

The respondent offered no contrary evidence. The trial court explicitly held that Mr. Summers' testimony was credible. FoF 157. It explicitly incorporated his report into its findings of fact. FoF 73.

If the Court had applied the measure of recovery adopted by the Supreme Court in *Noel*, the trial court should have valued Jim and Shannon Young's work at $760,382.00, the amount that Judith Young would have paid to hire another contractor to perform the same work. The trial court erred by adopting a lesser measure of recovery.

C. Jim and Shannon Young's work increased the value of the property by at least $750,000.

In the alternative to the fair market value of their services, Jim and Shannon Young were entitled to recover the amount by which their work increased the value of the respondent's property. Jim and Shannon Young's work increased the value of the property by at least $750,000.

As set forth in Jim and Shannon Young's opening brief (p. 20), the trial court adopted the testimony of Jan Henry as to this issue. Ms. Henry, the realtor who sold the property in 1998, testified, based both on Judith Young's

offers and other offers that the seller received at that time, that the property had a value, in light of its condition, of the $1,050,000 that Judith Young paid for it. FoF 160. Jan Henry further testified that, at the time of trial, the property was worth between $2.2 and $2.5 million. FoF 161. Jan Henry testified that only $300,000 to $400,000 of the increase would have occurred had Jim and Shannon Young never performed any work on the property. FoF 162. See also RP 556-57. The trial court explicitly found Jan Henry's testimony to be credible, FoF 163, and explicitly rejected the testimony of the expert proffered by respondent as not credible. FoF 167.

Under the most conservative construction of Jan Henry's testimony, the respondent's property that is worth at least $2.2 million today would have been worth at most $1.45 million if Jim and Shannon Young had not worked on it. Therefore, the trial court should have awarded Jim and Shannon Young at least the $750,000.00 increase in the market value of the property caused by their work. By awarding Jim and Shannon Young a recovery limited only to what their work had "cost them," the trial court gave respondent at least a $250,000 windfall.

The respondent has not addressed this analysis. By failing to do so, respondent has implicitly conceded that it is correct.

For this second, separate reason, the trial court's award Jim and Shannon Young was inadequate. This Court should reverse.

D. The trial court incorrectly attempted to limit Jim and Shannon Young's recovery to its approximation of the costs that they had incurred.

The proper measure of damages in an unjust enrichment case is the greater of: (1) the cost the property owner would incur to obtain the same services on the market; and (2) the amount by which the services provided have increased the value of the property. As set forth above, under the first measure, the trial court should have valued Jim and Shannon Young's work as being worth at least $760,382.00. Under the second measure, the trial court should have awarded Jim and Shannon Young a recovery of at least $750,000.

The trial court did not do this. It did not adopt either of what it expressly stated to be the "generally" "appropriate" measures of recovery. CoL 5. Instead, it purported to limit Jim and Shannon Young's recovery only to the $501,866.00 in direct construction costs that Michael Summers identified in his cost estimate. CoL 6-7. See also Tr. Ex. 87, p. 9.

The trial court did not justify its decision to depart from what it acknowledged was the "generally" "appropriate" measure of recovery. The trial court would have been entitled to limit Jim and Shannon Young only to

a recovery of their "costs" only if it had found Jim and Shannon Young to be "at fault." *Noel v. Cole,* 98 Wn. 2d at 383.

But the trial court plainly did not find Jim and Shannon Young to be "at fault." The trial court explicitly found that Jim and Shannon Young began working on the property in direct response to Judith Young's request that they fix it up for her in anticipation of her move. FoF 43-46, 52-53, 63, 90-91. The trial court explicitly found that Jim and Shannon Young continued to fix up the property after the respondent had decided not to move out to the property because the parties in good faith believed that they had reached an agreement to develop the property as a cattle ranch. FoF 112-119. Because the trial court made no finding that Jim and Shannon Young had acted in bad faith, or were in any way "at fault," *Noel* obligated the trial court to award Jim and Shannon Young the amount it would have cost the defendant to hire a contractor to perform the work they had performed.

The respondent attempts to explain the trial court's decision to employ a legally incorrect measure of recovery by pointing to certain alleged "facts." Respondent's Brief, pp. 18-19. Several of the claimed "facts" have no support in the record.

For example, respondent claims that Jim Young was not licensed as a contractor. Respondent's Brief, p. 18 (third paragraph) The trial court explicitly found that he was. FoF 4. Respondent claims that Jim and Shannon Young did not keep her apprised of the work that they were performing. *Id.* p. 19 (fourth paragraph). The trial court found squarely to the contrary. FoF 87-91. And respondent claims Jim and Shannon Young received benefits, particularly the use of the property, which the trial court did not address in calculating the offset. *Id.* (second paragraph). To the contrary, the trial court specifically found, as a fact, that Jim and Shannon Young had done substantial work simply maintaining the property and keeping up the grounds (none of which was included in Mr. Summers' cost estimate), the value of which "equaled or exceeded" the fair market rental value of the property. FoF 95-96.[2]

In any event, the trial court did not purport to base its decision on any of the "facts" advanced by respondent. Because the trial court did not purport to find Jim and Shannon Young to be "at fault," following *Noel,* the trial

[2] The trial court also found that the respondent had failed to prove that the property had any fair market rental value. CoL 21(b). The trial court also specifically concluded that, to the extent that the property had a rental value, it had rental value only on account of the substantial improvements that Jim and Shannon Young had performed, but for which they had not yet been compensated by the respondent. *Id.*

court should have awarded Jim and Shannon Young the amount it would have cost the respondent to hire a contractor to perform the same work. Because the trial court did not do this, the trial court committed clear legal error. Its decision should be reversed.

Moreover, even if the trial court were entitled to exclude the items in addition to direct construction costs set forth on the final page of Mr. Summers' cost estimate on the grounds that Jim and Shannon Young had not actually incurred them, the trial court plainly erred in excluding all of these "costs." The figures identified by Mr. Summers in his cost estimate included the amount it would have cost a general contractor to supervise the work. Exhibit 67, p. 9. The trial court found, as a fact, that Jim and Shannon Young supervised the worth that others performed. FoF 79. Mr. Summers' cost estimate included the cost of having the contractor provide the tools and equipment necessary to perform the work. Exhibit 67, p. 9. Jim and Shannon Young supplied all of the tools and equipment necessary to perform the work. FoF 80. Mr. Summers' estimate included an amount to cover the cost of cleaning up the debris generated by the work. The trial court's findings either state, or clearly imply, that Jim and Shannon Young had. FoF 81-82, 84, 130-131.

In addition, Mr. Summers' estimate included an allowance of a reasonable profit. Under the circumstances of this case, if Jim and Shannon Young's recovery were to be based on their "costs," they were entitled, in addition, to recover a reasonable profit. *Heaton v. Imus,* 93 Wn. 2d 249, 254, 608 P.2d 631 (1980)*; Yates v. Taylor,* 58 Wn. App. 187, 193, 791 P.2d 924, review denied 115 Wn. 2d 1017 (1990). By limiting their recovery only to the direct out-of-pocket costs a contractor would have incurred in performing specific projects identified by Mr. Summers, the trial court wrongfully denied Jim and Shannon Young any profit.

Finally, the trial court's award completely ignored the fact that Mr. Summers' expressed his cost estimate in calendar year 2000 dollars. FoF 77; Tr. Ex. 87 (p. 9, fn. 2); RP 419. Mr. Summers testified that his cost estimate would have been 20-25% higher (i.e., $912,458.40 to $950,477.50) if he had been asked to express it in current dollars. RP 419. Because Jim and Shannon Young were still occupying the property at the time of trial, the Court should have based its award to Jim and Shannon Young on the *current* cost to the respondent of those services. See 24 A.L.R. 2d 11, § 17 (Valuation of amount claimant is entitled to recover to be made as of time claimant turns over possession of property).

IV. CONCLUSION

In measuring Jim and Shannon Young's recovery for the work they had performed improving the respondent's property, the trial court correctly acknowledge that the "generally" "applicable" measure of recovery was the greater of: (1) the cost Judith Young would have incurred to have hired a contractor to perform the work that Kim and Shannon Young had performed; or (2) the amount by which their work had increased the value of her property, whichever was greater. CoL 5. Applying this standard to the undisputed testimony of Jim and Shannon Young's expert witnesses, whose testimony the trial court specifically found to be credible, the trial court should have valued Jim and Shannon Young's work as being worth at least $760,382.00.

The trial court did not apply the legally correct measure of recovery. It erroneously attempted to limit Jim and Shannon Young's recovery to its approximation of the "costs" which Jim and Shannon Young had actually incurred in performing the work. And it erred in approximating these "costs."

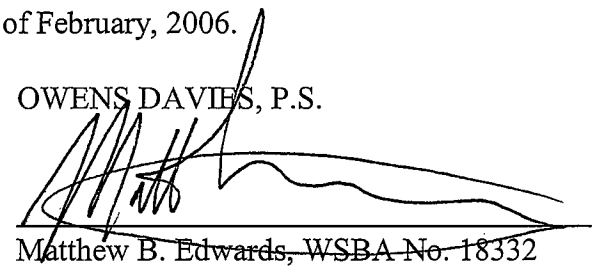
The trial court's decision to employ an incorrect measure of recovery has denied Jim and Shannon Young compensation for the full value of their

six years worth of labor. It has given the respondent at least a $250,000.00 windfall.

Because the trial court employed a legally incorrect measure of recovery, this Court should reverse. It should remand with instructions that the trial court enter a new judgment, based on a minimum valuation of at least $760,382.00.

DATED this 6th day of February, 2006.

OWENS DAVIES, P.S.



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